87-287

Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

October Term, 1987

STEPHEN R. REED,
*Petitioner,*
v.
JACK R. KARPER
*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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## STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether Pennsylvania's so-called "Nanty-Glo" rule, prohibiting directed verdicts when the state of mind of the movant is at issue, even in the case of First Amendment law application, comports with the constitutional requirement enunciated by this Court in a line of cases beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964), and continuing through *Bose Corp. v. Consumers Union of United States*, 104 S.Ct. 1949 (1984), holding that trial judges "*must* exercise independent judgment and determine whether the record establishes actual malice with convincing clarity."

2. Whether the state court below unconstitutionally reduced the public official plaintiff's burden of proof, contrary to relevant decisions of this Court.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, denying allowance of appeal, entered in this proceeding on May 4, 1987.

## OPINIONS BELOW

The memorandum decision of the panel of the Superior Court of Pennsylvania has not been reported. It is reprinted in the Appendix hereto, p. 1a, *infra*. The opinion of the Dauphin County Court of Common Pleas (trial court) is reported at 106 Dauph. 81 (1985), and is reprinted in the Appendix hereto, p.11a, *infra*.

## STATEMENT OF JURISDICTION

This case was decided and jury verdict rendered in the Dauphin County Court of Pleas on June 22, 1984. The trial judge, after denying both parties' post-trial motions, directed the Prothonotary to enter judgment in favor of Jack R. Karper and against Stephen R. Reed in the amount of $1,200.00, compensatory damages, and $4,000.00, punitive damages on May 31, 1985. A panel of three Judges of the Pennsylvania Superior Court affirmed the Order of the Court of Common Pleas of Dauphin County on June 27, 1986. Application for Reargument before the Superior Court *en banc* was denied, *per curiam*, on August 12, 1986. The Pennsylvania Supreme Court denied the Petition for Allowance of Appeal on May 4, 1987. On July 22, 1987, Justice White signed an order extending the time for filing this petition for certiorari to and including August 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

## CONSTITUTIONAL PROVISIONS INVOLVED

**U.S. Constitution, Amendment I:**

> Congress shall make no law ... abridging the freedom of speech, ...

**U.S. Constitution, Amendment XIV:**

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

## INTRODUCTION

This case involves the extent to which freedom of expression upon public matters is to be secured by the First Amendment. Petitioner, at the time here involved, was the Mayor-elect of the City of Harrisburg, Pennsylvania. In the midst of grand juries investigating allegations of corrupt city practices and rampant stories of influence-peddling in the Department of Public Works, Petitioner publicly called for an investigation of the Public Works Department and expressed concern about the security of records and files pending his upcoming inauguration. When told that at least one individual had witnessed the removal by Respondent, or his agents, of files and records from city property, Petitioner sought and received an *ex parte* preliminary injunction enjoining such actions.

In what the trial court characterized as "a politically charged atmosphere," Petitioner took actions and made statements calculated to preserve the integrity of records for later investigation. Despite a sincere concern for the City government and office he was about to assume, and external events lending credence to his beliefs, the state court has punished Petitioner for his comments on the performance and actions of Respondent, a public official.

The state courts in Pennsylvania have "turned their backs" on First Amendment claims, involving matters of public concern, by unconstitutionally delegating to juries the question of whether an utterance should be stripped of First Amendment protection, and, at least in this instance, by narrowing the burden of proof required of a public official plaintiff. Not only has Petitioner's First Amendment rights been violated, but the privilege of all Pennsylvanians to comment upon official conduct has been unconstitutionally chilled.

## STATEMENT OF THE CASE

This case relates to the continued vitality of the doctrine first announced by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964), wherein this Court detailed, "the extent to which the constitutional protection(s) for speech ... limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct."

As the trial court noted (15a), "the controversy was politically charged and between persons long prominent in Harrisburg city politics."[1] The Petitioner, Stephen Reed, had just conducted a successful campaign in unseating the incumbent Mayor, Paul Doutrich. Respondent, Jack R. Karper, was a close associate and political ally of Mayor Doutrich, serving as the Deputy Director of the Bureau of Public Works and Superintendent of the Steam Generating Plant.[2]

Two days after his election, on November 5, 1981, Petitioner called a news conference to reveal allegations he had received during the course of his campaign that acts of criminal mis-

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[1] Respondent Jack Karper was determined, by the trial court, to be a pubic official as a matter of law. Petitioner, Stephen R. Reed, as a Dauphin County Commissioner and Mayor-elect of the City of Harrisburg, was similarly a public official. Hence, both antagonists had ready access to the news media.

[2] The Steam Generating Plant, or incinerator as it was known, a facility located adjacent to the Vehicle Maintenance Center, was under the Department of Public Works and responsible for disposing of city refuse.

conduct had been rampant in the Public Works Department.[3] Against a backdrop of federal grand juries investigating the awarding of city contracts by the Department of Public Works and other city operations,[4] and occurring on the very day that federal indictments were being announced against the Harrisburg City Chief of Police and his assistant, in an on-going investigation of city corruption, Petitioner's new conference called for an investigation of the City's Public Works Department. Petitioner focused upon specific areas of possible illegal activity, identified as:

> --bid-rigging, payroll padding, and the hiring of ghost employees;
>
> --conversion of city-owned property to personal and private commerce use by employees;
>
> --diversion of City-purchased supplies;

---

[3] At this time, Petitioner did not reveal any specific individuals who might be guilty of acts of criminal misconduct, but said that his sources were from both within and outside the Doutrich Administration and that he had known of these allegatins for three months, but did not raise the issues publicly before so as to avoid any question that they were politically motivated.

[4] Testimony at the trial of the instant matter adduced that a former Harrisburg purchasing agent quit her job because "she was instructed to engage in potentially illegal activities" by "making municipal purchases from specific vendors without obtaining public bids." Testimony also indicated that a former City employee went to Petitioner, when he as a State Representative, complaining of being asked by Respondent to reveal rival competitive bids to a favored contractor so that the favored vendor would be low bidder. This same contractor later testified before the federal grand jury investigating Harrisburg City practices.

--alteration of housing code violation records and filing of false police reports; and

--possible kickbacks and other benefits in exchange for contracts. (R.712a)[5]

Simultaneous with the news conference, Petitioner forwarded a three page letter to the Dauphin County District Attorney listing the aforementioned categories of possible abuse and asked District Attorney Lewis and State Police Captain Herman Faiola to investigate these allegations.[6] In concluding his news conference, Petitioner stated that he wanted to prevent the possible removal of records from the Public Works Department and called upon those with information about the alleged misconduct to come forward.

In response to Mayor-elect Reed's request for information, he was the recipient of three telephone calls from city employees that very evening. All three callers identified themselves as employees of the City Steam Plant, and all three stated that there were records being removed from the Vehicle Maintenance Center building. All three gave their names, but Petitioner recognized only one of the persons (Ricky Snyder), having known him for

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[5] References are to the manner of reproducing the record in Pennsylvania appellate practice. The record is on file in the Prothonotary's Office of the Pennsylvania Supreme Court.

[6] District Attorney Lewis initially was quoted as saying that he would need more specific information than was contained in Petitioner's letter; that he would have to be satisfied that there was sufficient evidence to pursue; and that no prosecution was then warranted . (R.711a) Later, however, he did authorize an investigation. (R.456a-457a).

six years from a mutual civic organization. According to Petitioner's later testimony, Snyder told him that there were three people removing files and placing them in automobiles in the parking lot of the steam plant, and that one of these individuals was Respondent Jack Karper. Snyder, according to his conversation with Petitioner, was able to look into the automobiles and saw City files and City stationery. (R.441a). Of the three telephone callers, only Snyder was willing to testify in court.

After hearing that Snyder would be willing to testify in court, Petitioner began to write down notes from the conversation, which lasted approximately twenty minutes. Following the Snyder conversation, Reed telephoned his attorney, Joseph K. Pierce, to tell him of the substance of Snyder's telephone call. After asking Pierce what he could do to prevent the removal of City records and files, Pierce responded that he could file for an injunction preserving and protecting the records. (R.443a). Pierce told Reed that he would like to speak with Snyder the following day. According to Pierce's later testimony, Snyder told him at that first meeting the names of others who could corroborate his testimony. (R.629a).

As soon as Petitioner completed his conversation with Pierce, he personally typed an affidavit for Snyder's signature based upon the notes he took during their telephone conversation and within thirty minutes of the talk with Snyder. (R.444a). He then forwarded the affidavit to Attorney Pierce, who was to handle the arrangements for obtaining the preliminary injunction. (R.445a).

The following day, Friday, November 6, 1981, Attorney Pierce appeared in Dauphin County Court to seek an ex parte injunction based upon the information which he had received. (R.447a and 727a-735a). Dauphin County Judge John C. Dowling thereupon issued a decree enjoining Respondents

(Mayor Paul Doutrich, Jack R. Karper, Kim Robinson, and all other employees of the City of Harrisburg) from "removing, destroying, hiding or otherwise taking custody and control of records, documents, papers, filings, contracts, bids and so forth (City records) from the City of Harrisburg ... [with] intent to temporarily or permanently deny the City its rightful custody, control and ownership." (R.725a-726a). A hearing on the continuance of the *ex parte* injunction was scheduled for Monday, November 9, 1981 at 2:00 p.m.

The petition filed alleged, among other relevant matters, the following information, contained in paragraphs nine and ten:

> 9. Petitioner has received reliable information from City employees that various records, documents, papers, contracts, bids, filings and so forth have already been and are now being removed from the custody, control and ownership of the City for the sole purpose of having such City records permanently destroyed, hidden or otherwise removed from the City's custody, control and ownership.
>
> 10. In support of Petitioner's averment in Paragraph 9, supra, there is attached hereto, incorporated herein by reference, and labelled Attachment A, the sworn affidavit of Ricky Snyder of Middletown, Pennsylvania, a city employee, which states, inter alia, that he personally witnessed the removal of City Records from the Vehicle Maintenance Building by Respondent Karper, Kim Robinson, a city employee, and a third unidentified person.

(R.727a).

The attached affidavit from Ricky Snyder was signed and dated November 6, 1981 and said in relevant part:

> The files were viewed by me at a distance of approximately four feet; I was unable to remove the files for review as they were in the custody of three persons who were carrying the same files from the administrative offices to three vehicles. The individuals carrying and loading the files into vehicles were Kark (Jack) R. Karper, Plant Superintendent, his daughter and administrative assistant, Kim Robinson and an unidentified woman whose name is not known to me but whom I would be able to recognize again. The files were piled into the City-owned vehicle assigned to Mr. Karper and into the personal vehicles of Kim Robinson and the unidentified woman; ... (R.734a-735a)

Snyder later stated that he reviewed the affidavit before signing it on Friday, November 6, 1981.

On Sunday evening, November 8, 1981, Attorney Pierce was meeting with Ricky Snyder in preparation for the hearing which was to occur the following day, when he discovered a discrepancy between what the affidavit had represented and what Snyder's testimony would be. (R.626a). This discrepancy related to Karper's physical presence when the files were being carried from the building. Snyder's testimony, despite executing an affidavit to the contrary, was that Karper was not physically present when the records and files were being removed (R.627a). Therefore, the petition filed with the Court and supporting affidavit of Snyder were not totally accurate. Pierce advised Petitioner of this situation, according to Pierce, "at 1:30 p.m. on the day of the hearing (November 9, 1981) or earlier in the day" (R.626a), and according to Petitioner, when he sat down at the witness table on Monday, November 9, 1981. (R.480a).

Petitioner later testified that Pierce told him at the beginning of the hearing that the affidavit was not accurate in that Snyder "did see Jack Karper carrying what appeared to be blueprints or

rolled up documents and put them into the same car as everything else had been placed and then leaving, but that it was not at the same time as he saw the two women placing boxes into that same car.... He did not say he didn't see Jack Karper. He didn't see Jack Karper until later on that afternoon." (R.480a-481a). Pierce's testimony was that he did not "recall" advising Reed of that, saying "I don't recall that and I don't honestly to this day remember Mr. Snyder advising me of that point. That's not to say he did not or I did not advise Mr. Reed. I just do not have that impression in my mind that he saw Mr. Karper again." (R.626a).

Due to this discrepancy, and prior to the beginning of the hearing, a meeting was held in Judge Dowling's chambers at which time Attorney Pierce asked the Court to modify or amend the petition to show the equity action against respondent Karper in his capacity as officer in charge of the documents. (R.627a). This was rejected by Karper and/or his counsel, and the hearing was conducted as scheduled.

Testimony at the Preliminary Injunction Hearing revealed that some items were being removed from the Public Works Department by employees under the administrative direction of Jack Karper, including his own daughter, and placed in vehicles belonging to Karper and his daughter. The following testimony by Ricky Snyder is illustrative:

> Q. Whose car?
>
> A. This is Kim Robinson's (Karper's daughter) car. I looked in the back of that car and in it was contained these boxes which I had observed earlier and at which time I took a closer look and at that time I saw papers that contained the letterhead of the city.
>
> Q. And did you observe any other items? ...

A. At that time I saw the three boxes and a blueprint type of roll. ...

Q. And where were these boxes now?

A. These were in the back seat of Kim Robinson's car. ...

Q. Okay. Earlier you testified that Mr. Karper's car was visible to you on going over to the vehicle maintenance center. Was it still there?

A. Yes, and in the back was a box also.

COURT: In the back of whose car?

A. Jack Karper's car. ...

Q. You say you went on then when you heard the door open?

A. Yes, as I turned around I saw Kim and this other lady bringing two more boxes out. ...

Q. Did you report this to anyone ever?

A. I reported this to my immediate supervisor.

(Preliminary Injunction Hearing, N.T. pp. 39-40).

Relative to the affidavit he executed, Snyder also testified as follows:

Q. Mr. Snyder, I show you what's been marked Plaintiff's Exhibit No. 1. Would you turn to the affidavit? I would ask you, do you recognize that affidavit, sir?

A. Yes, sir.

Q. And is that your signature at the bottom of the first page?

A. Yes.

Q. In your handwriting, one of two pages?

A. Yes.

Q. And is that your signature on the second page at the end of the affidavit?

A. Yes.

Q. And is that your writing down there, two of two pages?

A. Yes.

Q. When did you sign that affidavit?

A. On Friday.

Q. And where did you sign that?

A. [to Attorney Pierce] In your office.

Q. And were you given an opportunity to review it?

A. Yes.

Q. Before you signed it?

A. Yes.

Q. And did you review it, sir?

A. Yes, I did.

On Cross-examination, Snyder testified, in part, as follows:

Q. Nor did you ever tell, according to your testimony, Mr. Reed that you ever saw Mr. Karper involved with any of those files, is that correct?

A. At this point in time I can't remember word for word what I said to Mr. Reed at that time.

Q. You certainly would have remembered, wouldn't you, Mr. Snyder, if you identified Jack Karper as one of those people carrying files?

A. If I had seen Jack Karper, I would have said Jack Karper.

Q. So you didn't see Jack Karper so you wouldn't have told Mr. Reed that Jack Karper was one of the people involved in carrying files, is that correct?

A. I would have said that he is involved in removing the files because his car was there and that's his administrative office.

(Preliminary Injunction Hearing, N.T. p. 53, 54).

Following the hearing, Judge Dowling refused to continue the Preliminary Injunction. The following year, Respondent instituted suit for defamation and wrongful use of process. After extensive discovery and pre-trial motions, the action was tried, and a jury verdict for compensatory and punitive damages was

returned against Petitioner.[7]

## HOW THE FEDERAL QUESTION WAS PRESENTED

At the conclusion of Plaintiff's case-in-chief and upon motion of Petitioner, the trial court ruled as a matter of law that Plaintiff Jack R. Karper was a public official within the meaning of *New York Times v. Sullivan*. (R.422a). Petitioner at that time moved for a non-suit saying, "... at this point we would move that the actual malice, the burden which is on the Plaintiff here to establish, has not been established by the evidence to date, and for that reason he has not reached his burden and could not carry out the case." (R.422a). The trial court denied Petitioner's motion for non-suit. (R.426a).

When all the trial testimony, including rebuttal, was concluded, Petitioner filed a formal written motion for a directed verdict (R.50a) based upon the plaintiff's failure to prove "actual malice." The trial court denied the motion for a directed verdict. Following trial, Petitioner filed a motion for judgment notwithstanding the verdict (n.o.v.), alleging that plaintiff Karper "failed to prove 'actual malice' on the part of (Petitioner) by the standard of proof required, i.e. clear and convincing evidence" and that the trial judge in chambers had "indicated to counsel for the parties that the Court has not been satisfied that Plaintiff has proved by clear and convincing evidence that (Petitioner) acted with actual malice." (R.54a- 55a).

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[7] The jury found for the Respondent (plaintiff) on the defamation claim and for the Petitioner (defendant) on the wrongful use of process count.

## STATE COURT OPINIONS

The trial court, in its written opinion denying both parties' post-trial motions, made the following conclusions as to Petitioner's motion for judgment n.o.v.:

1. The Court charged the jury on the burden of proof relative to the showing of malice in a way satisfactory to Petitioner. (16a).

2. There was "ample evidence about the (Petitioner's) conduct and about the pertinent circumstances prior to and at the time that the allegedly defamatory statements were made from which the jury could well determine (Petitioner's) intentions and could assess the knowledge that he had." (17a).

3. The issue was properly for the jury. (17a).

A panel of three Judges of the Pennsylvania Superior Court heard the case upon appeal and issued a written Memorandum Opinion.[8] That opinion affirmed the decision of the trial court upon the following conclusions of law:

1. The "Nanty-Glo" rule, *Nanty-Glo Borough v. American Surety Co.*, 309 Pa. 236, 163 A.523 (1932), prohibits reliance upon the testimonial affidavits of the moving party, stating that it is the province of the jury to determine the facts when oral testimony is involved. (7a).

2. The proof of actual malice calls a defendant's state of mind into question and does not readily lend itself to summary dispo-

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[8] Memorandum opinions are issued when the opinion is considered to have no precedential value. Accordingly, this opinion is unreported.

sition. "Thus, just as the Nanty-Glo rule is derived from a case where a plaintiff requested a directed verdict, a prohibition against reliance upon testimonial affidavits of the party moving for summary judgment in an actual malice controversy can be derived directly from the language of the Supreme Court in St. Amant." (8a).

3. It is clear that (Petitioner's) course of conduct aimed at Karper was neither ambiguous nor casual. (8a).

4. Even though the content of the boxes witnessed being removed from City property was "the essence of the entire proceedings against Karper," and despite Snyder's seeing only what was on top of the files, Petitioner signed an affidavit to the preliminary injunction petition that Karper had removed records from the Vehicle Maintenance Center. (9a).

5. The fact that following his conversation with Snyder, it was Petitioner who wrote the affidavit signed by Snyder containing the key discrepancy as to Karper's participation in the alleged removal. (9a).

## REASONS FOR GRANTING THE WRIT

### I. The State Court Decision Below Is In Direct Conflict With Applicable Principles Established By This Court

Pennsylvania, in adhering to the so-called *Nanty-Glo* rule,[9] has chosen to disregard its responsibility to make constitutional fact determinations, where the question of actual malice is involved, before submitting a case to the jury. However, as Judge Wright observed some years ago, "[i]n my judgment *New York Times Co. v. Sullivan* makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth." *Wasserman v. Time, Inc.*, 138 U.S. App. 7, 9, 424 F.2d 920 (1970).

Questions of actual malice, therefore, are not for the jury to decide in the first instance. The trial judge must initially resolve whether there is sufficient evidence in the record containing objective facts which would justify a finding of actual malice as a matter of law. Only at that point may the case be given to the jury.

Accordingly, this Court only last year had cause to explain that summary judgment and directed verdict are proper "stages" to test whether a genuine issue exists regarding actual malice. In *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2502, 2514 (1986), the law was stated:

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[9] The *Nanty-Glo* rule, applied to questions of actual malice, effectively means that constitutional fact determinations will be decided by a jury, rather than a judge. Practically speaking, since they may be considered to be questions of fact and not of law, they may be insulated from meaningful review on appeal.

> In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. ... Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate ... question will be whether the evidence in the record could support a reasonable jury finding ... that the plaintiff has shown actual malice by clear and convincing evidence ...

Pennsylvania, by subscribing to the *Nanty-Glo* rule in actual malice cases, denies defamation case defendants their federal constitutional right to a determination that "the evidence in the record ... is of the convincing clarity required to strip the utterance of First Amendment protection." *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S.Ct. 1949, 1965 (1984), *before* submitting the case to the jury.[10]

This Court's decision in *Bose Corp. v. Consumers Union*, cited above, fully contradicts Pennsylvania's *Nanty-Glo* rule. Stating that "the rule of independent review assigns to judges a constitutional responsibility that *cannot* be delegated to the trier of fact," (emphasis added) 104 S.Ct. at 1959, this Court held that "[j]udges, as expositors of the Constitution, must independently

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[10] The Pennsylvania Superior Court, in conclusionary language, utilized the *Nanty-Glo* rule in responding to Petitioner's arguments regarding the lack of actual malice on the record. (7a). In fact, the state court appellate opinion does not bother to discuss Petitioner's citation of *Bose* and other cases of this Court holding that the trial and appellate courts *must* conduct a *de novo* examination of the record to determine if sufficient evidence of actual malice exists. While it did attempt an "actual malice" examination after its recitation of the *Nanty-Glo* rule, that analysis itself was constitutionally misapplied, as will be seen *infra*.

decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " *Id.* at 1965.

The Pennsylvania Superior Court, by "throwing up" the *Nanty-Glo* rule,[11] rather than discussing the aforementioned holdings of this Court, has done exactly what it is prohibited from doing: it has delegated to the jury the constitutional responsibility of judges to determine if the evidence in the record has "cross[ed] the constitutional threshold." Nor can it be argued that *Bose* or *Anderson* represent some novel doctrine. The "independent judgment" rule was itself clearly stated in *New York Times v. Sullivan, supra.*, 376 U.S. at 285. In fact, the *Bose* opinion cites other consistent decisions on this issue.[12]

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[11] The Superior Court opinion evidences an intent on the part of the state court to apply this rule to *all* defamation claims where actual malice is in issue, not merely the instant case.

[12] 104 S.Ct. at 1964-65. See *Jacabellis v. Ohio*, 378 U.S. 184, 190 (1964), where it was said that "[t]his Court has an obligation to test challenged judgments against the guarantees of the First and Fourteenth amendments, and in doing so this Court cannot avoid making an independent constitutional judgment on the facts of the case." See also *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971), where actual malice was defined as a "constitutional rule" and noting that "in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review 'the evidence in the ... record to determine whether it could constitutionally support a judgment' for the plaintiff."

By invoking the *Nanty-Glo* rule, the state court has precluded, not only Petitioner, but an entire class of litigants (defamation defendants being sued by public official plaintiffs) from an independent judicial examination of the record *before* the case goes to the jury.[13] Pennsylvania's *Nanty-Glo* rule denies to this class of defendants their First Amendment right to have an independent decision as to "whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose, supra.*, 104 S.Ct. at 1965. Even though this examination may be later conducted by the appellate courts, after entry of judgment,[14] the process is, nevertheless, constitutionally flawed. It must occur prior to giving the case to the jury.

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[13] The Pennsylvania Superior Court decision below represented a departure, not only from this Court's holdings, but from even its own standards, as expressed by prior panels of that Court. For example, in *Curran v. Philadelphia Newspapers, Inc.*, 261 Pa. Super. 118, 395 A.2d 1342, 1347-48 (1978), Judge Spaeth wrote that state of mind should not be a jury issue "where the issue is recklessness, which is ordinarily inferred from objective facts. ...It is not enough for the plaintiff, in resisting summary judgment, to argue that there is a jury question as to malice; he must make a showing of facts from which malice may be inferred. (citing cases) Such an inference must be clear." Two years later, in *Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super. 588, 422 A.2d 625 (1980), Judge Spaeth noted in a concurring opinion that a plaintiff must be able to point to "facts" which make it "clear" that a jury could reasonably find malice in the *New York Times* sense. 422 A.2d at 636. Thus, the state appellate court itself is issuing conflicting and confusing rules of law. This Court needs to clarify the matter for Pennsylvania so that legitimate, free speech will not continue to be inhibited.

[14] See footnote 10, *supra*.

Despite clear language from this Court, the Pennsylvania Superior Court has remained fixed in its position, citing footnote 9 to this Court's decision in *Hutchinson v. Proxmire*, 443 U.S. 111, 120, n.9 (1979), that proof of actual malice "does not readily lend itself to summary disposition." (7a-8a). Any question, however, about the meaning of that observation was settled by this Court's comment last year, in *Anderson v. Liberty Lobby, Inc., supra.*, 106 S.Ct. at 2514, n.7, that the statement in *Hutchinson* was "simply an acknowledgement of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.' " *Id.* (citation omitted).

Thus, while no additional protections are being granted defendants in defamation actions, judges must still determine if the evidence of record meets this First Amendment threshold before sending a case to the jury. Pennsylvania's blanket *Nanty-Glo* rule, as applied to actual malice in defamation actions, denies to defendants their First Amendment protections required by *Bose* and other decisions of this Court.

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## II. THE STATE COURT DECISION BELOW REPRESENTS A SIGNIFICANT DEPARTURE FROM PREVIOUS DECISIONS OF THIS COURT AND IMPERMISSIBLY REDUCES A PUBLIC OFFICIAL PLAINTIFF'S BURDEN OF PROOF.

The trial court below candidly described the jury's reaction and conclusion when it noted, "... in the flush of November victory, defendant Reed made remarks the jury determined to be "incautious and defamatory." (15a). The word "incautious," however, connotes negligence, rather than actual malice.

This Court has consistently held that a plaintiff must prove more than falsehood or general hostility. *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6 (1969). This is particularly true when the subject matter being communicated is one of particular First Amendment concern. *Id.* at 10 (where public meetings of citizens concerned matters of local governmental interest and importance). "Debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan, supra.*, 376 U.S. at 270. Speech of public concern is at the core of the First Amendment's protections. *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 105 S.Ct. 2929, 2944 (1985).

False publications, in and of themselves, are not actionable by public official plaintiffs in the absence of malice or reckless disregard of the truth. This is because erroneous statement is inevitable in free debate and must be protected if the freedoms of expression are to have the "breathing space" they "need ... to survive." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). Thus, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). [I]t is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

The pertinent issue is whether Petitioner's statements require First Amendment protection, and the extent to which the state appellate court's determination improperly reduces the constitutional burden of proof required of a public official plaintiff.

The Superior Court below concluded that Petitioner "acted with at least reckless disregard of falsity..." (10a). However, this Court, through various cases, has attempted "meaningful guidance" in defining the line between "false communications which are protected and those which are not." As was carefully explained in this Court's seminal decision of *St. Amant v. Thompson, supra*:

> In *New York Times, supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the opinion emphasized the necessity for a showing that a false publication was made with a 'high degree of awareness of ... probable falsity.' 379 U.S., at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. *Id.* at 731.

The Pennsylvania Superior Court, nevertheless, has ignored this line of cases in reaching the result which Petitioner has challenged. In conducting its own, albeit belated, examination of the record,[15] the state appellate court cites the following reasons to support its finding of "recklessness":

1. Petitioner's course of conduct aimed at Karper was neither ambiguous nor casual. (8a).

2. That Petitioner signed an affidavit saying that Karper had removed records when his informant, Ricky Snyder, could not say what was *in* the boxes. (9a).

3. That it was Petitioner who drafted the affidavit signed by Snyder containing the key discrepancy as to Karper's participation in the alleged removal. (9a).

4. Petitioner's incorrect characterization, in his affidavit, that "the removed material included contracts, bids and filings." (9a).

5. Petitioner's statement that "Karper is the motivating factor on why we've done what we've done." (9a).

Such findings may satisfy a negligence standard, but clearly do not meet the burden of establishing either "actual malice" or "reckless disregard of the truth," in a constitutional sense. This

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[15] The trial court, required to conduct its own review of the record before sending the case to the jury, cited no reasons to justify the finding of actual malice, saying only that there was "evidence from which the jury could determine that Mr. Reed acted with malice..." (17a). For some unknown reason, it also found that its charge to the jury on "malice" vindicated its failure to conduct the requisite constitutional fact determination. (16a).

Court has previously held that pursuing a course of conduct out of ill will is not to be equated, constitutionally, with malice. *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974). In addition, at least one federal court has stated that an investigation "designed to confirm a hostile premise rather than to find the truth" does not establish malice. *Westmoreland v. CBS, Inc.* 596 F.Supp. 1170, 1173 (S.D.N.Y., 1984). Therefore, Petitioner's course of conduct toward Karper, regardless of how direct or personal, is irrelevant to a constitutional analysis of recklessness.

The only material inquiry, in fact, is whether Petitioner knew his statements were false at the time he made them, or had serious doubts as to their truth. If facts of record tend to show this, then the issue of recklessness may be determined by the jury. Anything less diminishes the constitutional burden of proof a public official is required to carry under decisions of this Court.

The facts cited by the Pennsylvania court do not pass constitutional muster. The fact that Petitioner stated, in a court document, that contracts, bids, and filings were part of the removed material merely demonstrates that he was incorrect, *not intentionally incorrect*. It is almost absurd to say that because Petitioner prepared the informant's affidavit (based upon their telephone call), that this demonstrates he knew it not to be true. Snyder himself *reviewed* and executed the document, according to his own testimony at the Preliminary Injunction Hearing.[16] No

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[16] In fact, Snyder also testified at that hearing that Karper was "involved in removing the files because his car was there and that's his administrative office." (see p. 12, *supra*.) The only discrepancy related to Karper's physical presence, not his involvement, according to Snyder.

evidence was ever presented that Petitioner *knew* he was preparing an affidavit which was not completely accurate. Quite clearly, it was a misunderstanding, which the Pennsylvania courts are attempting to equate with "actual malice."[17]

Moreover, the appellate court's finding that Petitioner should not have concluded anything about the content of the boxes, based upon Snyder's observation of what was on top of them, represents negligence at best, but certainly not constitutional recklessness. While these matters were occurring, it must be remembered, federal grand juries were probing alleged city corruption; indictments were being handed down; and at least one individual (in the preceding several years) had told Petitioner that Karper had instructed her to reveal bids of a competitor to a contractor he was associated with. The District Attorney found that there was sufficient information to conduct an investigation. Petitioner, therefore, had sufficient reasons, based upon objective facts, to make the statements he did, even though they were later found to be untrue.

Finally, the state appellate court has cited *St. Amant v. Thompson, supra*, for the proposition that a defendant cannot insure a favorable verdict by merely testifying he believed his statements were true, and that the finder of fact must determine whether the publication was made in good faith. (8a). This convoluted use of *St. Amant*, as applied to the facts of this case,

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[17] The Superior Court may be suggesting that Reed had reason to question the veracity of his informant within the meaning of *St. Amant*. This is clearly not so. Two other telephone callers made the same comments as Snyder, but were unwilling to testify in court. Snyder told Pierce that others could corrobrate his information. Allegations that files were to be removed before the next administration took office were rampant. There were no "obvious reasons" to doubt Snyder's veracity.

changes its meaning and is clearly inappropriate. The burden is not on defendant to show that he believed his statements to be true, rather it is on the plaintiff to demonstrate facts of record indicating that defendant seriously doubted what he was saying was true. See *Anderson v. Liberty Lobby, Inc., supra.*

None of the reasons advanced by the Superior Court does that. Petitioner did more than say what his state of mind was. He presented evidence showing how his attorney offered to amend the petition; testimony from city employees who Karper asked to do improper acts; and, most important, Ricky Snyder's own testimony that "Karper was involved in removing the files." (p.12 *supra.*)

This case, unless reversed, will effectively undermine decisions of this Court establishing a definition of constitutional recklessness where a public official plaintiff is involved. Pennsylvania will have changed the plaintiff's burden of proof in such a case from "actual malice" to simple negligence.

## CONCLUSION

For all of the foregoing reasons a writ of certiorari should be issued to review the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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# APPENDIX

JACK R. KARPER

v.

STEPHEN R. REED,
RICKY SNYDER,
and JOSEPH K. PIERCE:

APPEAL OF:
STEPHEN R. REED

IN THE SUPERIOR COURT OF

No. 00406 Harrisburg, 1985

Appeal from Order entered May 31, 1985,
Court of Common Pleas, Civil Division,
Dauphin County, No. 3746 S 1982

BEFORE: CAVANAUGH, TAMILIA and CERCONE, JJ.

PER CURIAM: FILED: JUNE 27, 1986

Order affirmed.

**JUDGMENT**

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the Order of the Court of Common Pleas of Dauphin County is affirmed.

_____

Deputy Prothonotary

Dated: June 27, 1986

JACK R. KARPER

v.

STEPHEN R. REED,
RICKY SNYDER,
and JOSEPH K. PIERCE:

APPEAL OF:
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IN THE SUPERIOR COURT
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Appeal from Order entered May 31, 1985,
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Dauphin County, No. 3746 S 1982

BEFORE: CAVANAUGH, TAMILIA and CERCONE, JJ.

MEMORANDUM: FILED: JUNE 27, 1986

This appeal is from an order of the trial court which denied a motion for judgment n.o.v. sought by appellant following an adverse jury verdict which awarded damages to appellee, Jack R. Karper, in the amounts of $1,200.00 compensatory and $4,000.00 punitive upon a cause of action grounded in defamation.

Appellant is Stephen R. Reed, a long time participant in political and governmental affairs in the Dauphin County area. He has held a number of civic and governmental positions including elected offices. He was elected as Mayor of the City of Harrisburg on November 3, 1981. Two days thereafter at a press conference in his county courthouse office, he announced he was calling for an investigation of the City's Public Works Department, alleging criminal misconduct by unnamed employees and disclosed that he had forwarded a letter to Dauphin County District Attorney Richard Lewis listing categories of alleged abuse and outlining specific information, asking Lewis and State Police Captain Herman Faiola to investigate allegations of

criminal misconduct in the Public Works Department. Although the letter did not mention specific names, Reed alleged that: certain public officials may have taken kickbacks for contracts; may have been a silent partner in certain bid and non-bid arrangements; misuse of federal block grant funds and of city owned equipment and personnel; private and commercial use of city owned property and supplies, as well as other claims of misconduct. Reed added that he wanted to prevent the possible removal of records from the Public Works Department. Reed testified that he later received three telephone calls at his home, each caller identifying himself as a steam plant employee. He stated that the calls indicated that there were records being removed from the Vehicle Maintenance Center Building. Two callers were not identified and the third he recognized as Rick Snyder. Reed further testified:

> A. After I finished the conversation with Mr. Snyder which lasted about 20 minutes, I telephoned Attorney Joseph K. Pierce and relayed to him what had been told to me by Mr. Snyder and said at that point I wasn't really quite sure what to do with that but what can we do to -- if this sort of thing is happening and there are records disappearing what can we do to prevent that from happening or to stop it from happening if it was already happening. And Mr. Pierce indicated that one avenue, legal avenue, would be to file for an injunction, order of the Court, to preserve and protect documents and that that would seem to be the course to follow and that was the comments that he made.
>
> Q. So based on your telephone call with Attorney Pierce what did you do then?
>
> A. Well, after I got off the phone with Joseph Pierce who indicated that he wanted to speak to Mr. Snyder then the next day, I said I will put now in writing that it is that Mr.

> Snyder told me over the telephone and put it in the form of an affidavit which I would then give to Mr. Pierce and did give to Mr. Pierce for him to then discuss with Mr. Snyder. From that point forward after having typed up that affidavit which, if I recall, was two pages long and recounted what I was told on the phone, I turned the letter over to Mr. Pierce. And at that point it was his to handle and he did handle it.

The next Friday, November 6, Pierce sought, and received, an ex parte injunction prohibiting any acts which would affect city records and a hearing on continuance of the injunction was set for November 9, the following Monday. The petition was accompanied by an affidavit which was signed by Rick Snyder and stated, *inter alia*, that (Jack) R. Karper was carrying and loading files into vehicles. Paragraph 9 of the Petition for Injunction accompanied by an affidavit signed by Stephen R. Reed avers:

> Petitioner has received reliable information from city employees that various records, documents, papers, contracts, bids, filings and so forth have already been and are now being removed from the custody, control and ownership of the City for the sole purpose of having such City Records permanently destroyed, hidden or otherwise removed from the City's custody, control and ownership.

Paragraph 10 avers:

> In support of Petitioner's averment in Paragraph 9, supra, there is attached hereto, incorporated herein by reference, and labelled Attachment A, the sworn affidavit of Rick Snyder of Middletown, Pennsylvania, a city employee, which states, inter alia, that he personally witnessed the removal of City Records from the Vehicle Maintenance Building by Respondent Karper, Kim Robinson, a city employee, and third unidentified person.

The Snyder affidavit, prepared by Reed, states:

> I am Rick Snyder, twenty-nine years of age and a resident of 340 Aspen Street, Borough of Middletown, Dauphin County, Pennsylvania and an employee of the City of Harrisburg at the City Steam Generating and Incineration Plant as a Maintenance Mechanic II.
>
> On Thursday, November 5, 1981, between 12:30 to 1:30 pm, I personally witnessed the removal of a substantial number of files from the administrative offices of the city Department of Public Works located in the Vehicle Maintenance Center, a building adjacent to the Steam Generating and Incineration Plant.
>
> The files were viewed by me at a distance of approximately four feet; I was unable to remove the files for review as they were in the custody of three persons who were carrying the same files from the administrative offices to three vehicles. The individuals carrying and loading the files into vehicles were Kark R. Karper, Plant superintendent, his daughter and administrative assistant, Kim Robinson and an unidentified woman whose name is not known to me but whom I would be able to recognize again. The files were piled into the City-owned vehicle assigned to Mr. Karper and into the personal vehicles of Kim Robinson and the unidentified woman; both of the latter vehicles are Volkswagens and the VW of Ms. Robinson is orange in color.
>
> I hereby swear or affirm that the foregoing is true and accurate to the best of my knowledge and belief.

When Attorney Pierce met with Snyder on Sunday night before the scheduled hearing, Pierce learned of what the difference would be between what the affidavit said and what

Snyder's testimony would be. This discrepancy dealt with whether Karper was present when the material was being carried out of the building. Following the Monday hearing, the trial court denied the application to continue the injunction. Pierce had advised Reed of a discrepancy in the affidavit by Snyder.

On appeal, appellant, Reed, does not challenge the substantive law which the trial court charged to the jury. The claim is that there is no evidence establishing actual malice as a matter of law with regard to Reed's published statements. It is claimed that under the evidence, a verdict should have been directed in favor of Reed.

Under the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) a public official such as appellant can recover damages for a defamatory falsehood relating to official conduct only if the public official proves that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." That a statement is made with reckless disregard of falsity must be based upon sufficient evidence that the defendant, in fact, entertained serious doubts as to the truth of the statement. While recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report, it cannot be concluded that a defendant entertained the requisite doubt as to veracity of the statement where it was based on information a defendant could reasonably believe to be accurate. There must be a high degree of awareness of probable falsity. See *Curran v. Philadelphia Newspapers*, Inc. 497 Pa. 163, 439 A.2d 652 (1981); *St. Armant v. Thompson*, 390 U.S. 727 (1969); *Time, Inc. v. Pope*, 401 U.S. 279 (1971).

Appellant, Reed, argues that there was no evidence of actual malice and that a verdict should have been directed for the defendant. Relevant to this is the statement of the majority of our supreme court:

The prohibition against reliance upon the testimonial affidavits of the moving party is derived from the famed case of *Nanty-Glo Borough v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932). That case involved a plaintiff's effort to obtain a directed verdict on the basis of the plaintiff's uncontradicted evidence. The trial court granted the verdict, but this Court reversed:

"In the words of Justice SHARSWOOD, 'However clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial if they should deem the verdict contrary to the weight of the evidence': *Reel v. Elder*, 62 Pa. 308. *** The credibility of these witnesses, without whose testimony plaintiff could not have recovered, was for the jury and plaintiff's motion for binding instructions should not have been granted."

309 Pa. at 238, 163 A. at 524. Since 1932, this Court has consistently adhered to the Nanty-Glo rule, most recently in *Thompson Coal Co. v. Pike Coal Co., supra* (1980).6

We are satisfied that case law of the Supreme Court of the United States supports our adherence to the Nanty-Glo rule in this controversy over the existence of actual malice. Recently, in *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), the Supreme Court "express(ed) some doubt" about the "rule" favoring the use of summary judgment in determining whether a plaintiff has adequately shown actual malice under *Times v. Sullivan*:

"The proof of 'actual malice' calls a defendant's state of mind into question. *New York Times Co. v. Sullivan*, 376

> U.S. 254, 84 S.Ct. 710 [11 L.Ed.2d 686] (1964), and does not readily lend itself to summary disposition. See 10 Wright & Miller, Federal Practice & Procedure + 2730, at 590-592."
>
> 443 U.S. at 120 n.9, 99 S.Ct. at 2680 n.9. More significant, in *St. Amant v. Thompson, supra*, the Supreme Court specifically stated that the defendant in a defamation action cannot insure a favorable verdict "by testifying that he published with a belief that the statements were true." 390 U.S. at 732, 88 S.Ct. at 1326. Rather, "[t]he finder of fact must determine whether the publication was indeed made in good faith." *Id.* Thus, just as the Nanty-Glo rule is derived from a case where a plaintiff requested a directed verdict, a prohibition against reliance upon testimonial affidavits of the party moving for summary judgment in an actual malice controversy can be derived directly from the language of the Supreme Court in St. Amant.

*Curran* at 662, 663, --- A.2d at ---.

The basis for the defamation action are published comments and statements made by Reed about Karper during the period from November 5 to November 10, 1981 including the equity action brought against Karper by Reed. Karper was, at the time, deputy director of the Harrisburg Department of Public Works. The statements included ones at a press conference and also statements made as part of, and at conferences concerning the equity action filed against Karper. As background then, we have statements and remarks not made simply in passing, but alleged defamatory statements made at press conferences, and as part of the invocation of court proceedings actually initiated by Reed. It is clear that Reed's course of conduct aimed at Karper was neither ambiguous nor casual. The statements in question were defamatory appellant does not argue to the contrary - the issue is whether there was sufficient evidence of actual malice.

As to the source of his information with respect to Karper's involvement in the removal of city records, Reed relied upon three phone calls to his home. As to two calls, Reed stated that they gave their names, but that he did not recall them and further stated that they had told him they would not testify in court. As to Snyder (whose call was inspired by Reed's televised press conference) it was stated that Snyder's suspicion was based upon seeing a pile of paper or files with the city seal or flag on it inside a car alleged to be employed in removing city records. Nevertheless, Reed admitted that his primary questioning of Snyder was over the *content* of the boxes since that was the essence of the entire proceedings against Karper. Despite this, Reed signed an affidavit to the petition that Karper removed records from the Vehicle Maintenance Center. Notwithstanding the focus on Karper, Reed later admitted that "it was entirely possible" that the involvement of Karper may have been "my impression." Reed publicly stated that "Karper is the motivating factor on why we've done what we've done" but admitted that he did not know the exact nature of the files allegedly being moved. Insofar as his knowledge of Snyder, Reed said that he had had very infrequent contact with him and, in fact, last had had a conversation with him nearly two years previously in conjunction with Snyder's activities as a scuba diver. Following his conversation with Snyder, it was Reed who wrote the affidavit signed by Snyder containing the key discrepancy as to Karper's participation in the alleged removal. Reed also took the affidavit to his court petition for an ex parte injunction which averred that City records "will continue to be removed for the purpose of permanently denying the City its rightful ownership, custody and control thereof." The record contains a statement by Snyder that he did not see Karper moving records and that if he had seen Jack Karper, "he would have said Jack Karper." Reed, in turn, admitted that Snyder was the only one upon whom he relied stating that until his conversation with Snyder "there was nothing really to go on." Further, despite the lack of specific information from Snyder, Reed stated in this sworn court petition that the removed material included contracts, bids and filings.

Our careful review of the record leads us to conclude that Reed acted with at least reckless disregard of falsity and with actual malice as to the allegations against Karper. We conclude that the evidence met constitutional standards and is clear and convincing.

Order affirmed.

JACK R. KARPER.
*Plaintiff*

v.

STEPHEN R. REED. RICKY SNYDER. JOSEPH K. PIERCE.
*Defendants*

IN THE COURT
OF COMMON PLEAS
DAUPHIN COUNTY.
PENNSYLVANIA

No. 3746 S 1982

## OPINION

This case came before the Court and a jury to consider plaintiff's claims for money damages against the three captioned defendants. The factual allegations involved Mayor-elect Stephen R. Reed's public statements concerning the plaintiff, an employee of the City of Harrisburg, just after the November election of 1981. There were two counts against the defendants: One count sounding in defamation and the other in wrongful use of process. Upon the close of the plaintiff's case motions for nonsuit on behalf of defendants Snyder and Pierce were made and granted. The jury returned a verdict against defendant Reed, on the defamation claim, for compensatory damages in the amount of $1,200.00 and for punitive damages in the amount of $4,000.00 and the verdict was for the defendant on the count for wrongful use of process.

The plaintiff filed post-trial motions seeking a new trial limited to damages, on the defamation claim, and did not contest the jury's verdict on the claim for wrongful use of process. Defendant Reed filed a post-trial motion for a judgment notwithstanding the verdict.

We will consider and evaluate the plaintiff's post- trial motions first.

The plaintiff has asserted forty-two reasons why a new trial

should be awarded. These reasons are based on a two-pronged argument: That the verdict was patently so inadequate that a new trial is warranted and that the Court committed trial errors that produced an inadequate verdict. The only request of the plaintiff is, however, for a new trial limited to the issue of damages. No request is made for a new trial on all issues because of the alleged errors.

The plaintiff, despite his multitudinous attack on the trial Court's act, has a simple, though double-edged, hope. It is that the verdict *for the plaintiff and against the defendant* will not be disturbed, and, that he can get more money than the jury awarded. With this understanding of the plaintiff's post-trial position, an examination of his allegations of error produces some confusion. Some of the alleged errors are because the Court refused plaintiff's request for the withdrawal of a juror. (Plaintiff's Amended Motion for a New Trial Limited to Damages No. 7 and No. 17.) How we are to deal with an alleged error in failing to terminate the trial and only grant a new trial as to damages is a little hard, at the very least, to understand. Most of the errors alleged, twenty-four, are for errors in the charge and almost all of these alleged errors deal with definitions and explanations of the terms a part of the law of defamation and the appropriate burdens of proof. Since the plaintiff prevailed with the jury the only remaining reason why the plaintiff can put forward these allegations is to urge that, somehow, different definitions would have increased the dollar amounts of the verdicts. As an example, plaintiff argues that the Court defined the burden of proof upon the plaintiff as to malice of the defendant as a "clear and convincing" standard and suggests that the use by the Court of a "preponderance of the evidence" standard would have produced a higher verdict. One would think that the opposite might be true: If the jury was given an instruction requiring the plaintiff to prove malice through clear and convincing proof, rather than by a preponderance of the evidence, and the jury found that the plaintiff did meet that burden, the verdict would probably have

been higher. But, regardless of such speculation, we do not believe the plaintiff's logic persuasive as to this part of his argument.

Many other errors are alleged to have been made in the course of the trial as to witnesses, exhibits, the propriety of counsel's closing remarks and whether or not exhibits should have been viewed by the jury during their deliberations. However, the thrust of the argument relative to all of these alleged errors is that the trial court's conduct produced a verdict that, correct as to liability, was too low an award. No cases have been furnished us which support, in our opinion, this type of argument and we will not grant a new trial, limited to damages, for such reasons.

Having concluded, for the reasons just recited, that a limited new trial is not appropriate because of the alleged errors complained of, the question necessarily becomes: Under what circumstances is a new trial, limited to damages, proper?

At common law a new trial limited to damages was not permissible. *Troncatti v. Smereczniak*, 428 Pa. 7, 235 A.2d 345 (1967). However, such a procedure has developed in recent years and is derived from the court's power to grant a new trial because a verdict was not adequate. This derivative procedure has developed, in Pennsylvania and elsewhere, as a reasonable way to expedite litigation in certain circumstances. These circumstances exist when, first, the verdict is either so inadequate or so excessive that a new trial, for that reason, is warranted. Second, the issue of liability in the first trial must have not been contested or, upon review, found to have been fairly determined. Third, the issue of liability and damages must not be intertwined. In such situations our courts have said that it is reasonable to avoid the retrial of liability and just deal with the issue that is patently improper, the damages. *Berkeihiser v. DiBartolomeo*, 413 Pa. 158, 196 A.2d 314 (1964). In such a case fairness is accorded both parties: The liability decision is not reasonably impeachable and so the loser

on that issue cannot complain and the party affected by the unreasonable verdict receives a reconsideration of that issue.

Many times, however, such a limited retrial is neither reasonable under the circumstances nor fair to both parties. These situations occur when the liability has been vigorously contested and was at issue in the case. After such a trial a damage verdict that is too high or too low may be the product of a jury's compromise, or misunderstanding of the issues that were vigorously debated. In that situation our courts have held that it would be unfair to the party or parties whom the jury determined to be liable to deny them the right to reassert their position in a new trial and yet give the damage verdict winner a chance to increase the amount of award. Therefore, in this type case, the proper post-trial relief is a new trial on all issues. *Dougherty v. Sadsbury Township*, 299 Pa. Super. 357, 445 A.2d 793 (1982); *Riddle v. Anderson*, ____ Pa. Cmwlth. Ct. ____, 481 A.2d 382 (1984).

In both of these new trial settings, the catalyst is the improper verdict. Unless the verdict is excessively low or excessively high, the issue is not reached. The criteria for the trial judge to use in making a determination as to the adequacy of the verdict have often been stated.

> The verdict must cause the trial judge to lose his breath, temporarily, and cause him to almost fall from the bench. *Coward v. Ruckert*, 381 Pa. 388, 113 A.2d 287 (1955).

> The injustice of the verdict must stand out like a beacon. *Bortner v. Gladfelter*, 302 Pa. Super. 492, 448 A.2d 1386 (1982).

> The verdict must be so inadequate as to indicate passion, prejudice, partiality or corruption in the jury process. *Dougherty v. Sadsbury Township*, 299 Pa. Super. 357, 445 A.2d 793 (1982).

In evaluating the verdict and determining its adequacy the trial court must bear in mind the right of the jury to compromise. Thus, a verdict, which may seem low, may be acceptable if it appears that the jury did compromise by reducing the amount of damages in a case where the liability was not clear and was hotly contested. *Rhodes v. Hollander*, 260 Pa. Super. 290, 393 A.2d 1268 (1978); *Phelps v. Brittain*, 412 Pa. 55, 192 A.2d 689 (1963).

The case before the Court now, the texture of which must be measured against the standards set forth above, was indeed hotly contested and, with both parties filing post-trial motions, continues to be. The central issue was defamation and whether defendant Reed had issued his statements concerning the plaintiff with "malice" as that term has meaning in the law of defamation pertinent to "public figures". We believe it to have been a case where the issues of liability and damages were intertwined and not readily separable and we believe it to have been a case where the jury could well have compromised the liability issue with the damages awarded. Thus, we must look carefully at the trial's evidence, because of the possibility that the jury compromised, before we discard the jury's verdict.

Such a careful look reveals that the plaintiff was a political ally of defendant Reed's mayoral opponent and that, in the flush of November victory, defendant Reed made remarks the jury determined to be incautious and defamatory. The plaintiff, however, certainly knew that his job as a city department head would be lost when the new administration was seated and organized and there was contradictory evidence as to how the plaintiff's reemployment prospects were affected by the defendant's statements about him. In short, the controversy was politically charged and between persons long prominent in Harrisburg city politics. The Court's review and analysis is that the jury did its job, resolved the controversy, and applied compensation and punishment as it deemed appropriate. We have no reason, after review, to differ with the jury's assessment and treatment of the

case. Having thus determined that the verdicts, as to damages, were not excessively low or excessively high we deny the plaintiff's request for a new trial limited to damages.

As noted, defendant Reed has filed a motion for judgment notwithstanding the verdict. In that motion the defendant argues that:

1. The verdict was contrary to the evidence.
2. The verdict was contrary to the weight of the evidence.
3. The evidence failed to show by clear and convincing proof that defendant Reed's statements were made with actual malice.

The relief sought by the defendant is an extreme remedy and should only be entered in clear cases after evidence has been evaluated in a light most favorable to the verdict winner. In that evaluation any doubt should be resolved in favor of the verdict winner, considering the evidence and all reasonable inferences therefrom. *Beechwoods Flying Service, Inc. v. Al Hamilton Contracting*, 317 Pa. Super. 513, 464 A.2d 440 (1983); *Giambra v. Aetna Casualty & Surety*, 315 Pa. Super 231, 461 A.2d 1256 (1983). An evaluation of the evidence in this case with these guidelines, leads us to conclude that the verdicts were proper and supported by the evidence.

The third contention of the defendant is that the evidence was insufficient as to "malice" in accordance with the standard imposed by the law upon the plaintiff. It must be noted that the Court charged the jury on the burden of proof relative to the showing of malice in a way satisfactory to defendant Reed. The charge made on this issue was that advocated by defendant Reed and no exception was taken to it. The jury utilized that instruction and found against defendant Reed. It was asserted at trial, and now, that the Court should have made a determination that Mr. Reed had not acted with the requisite "malice" and not permitted the issue to go to the jury. We do not believe such an act

by the Court would have been proper then, as a directed verdict, or, now as the entry of a judgment notwithstanding the verdict. There was ample evidence about the defendant's conduct and about the pertinent circumstances prior to and at the time that the allegedly defamatory statements were made from which the jury could well determine Mr. Reed's intentions and could assess the knowledge that he had. There being evidence from which the jury could determine that Mr. Reed acted with malice, and considering that the Court charged the jury on this issue satisfactorily to Mr. Reed, the issue was properly for the jury. Accordingly, we deny the defendant's request.

Having considered the post-trial motions of the plaintiff and defendant Reed to be without merit, we enter the following

**ORDER**

AND NOW, this 31 day of May, 1985, we deny the request of Jack R. Karper for a new trial, limited to damages, and we deny the request of Stephen R. Reed that judgment be entered in his favor.

The Prothonotary is directed to enter judgment in favor of Jack R. Karper and against Stephen R. Reed in the amount of $1,200.00, compensatory damages, and $4,000.00, punitive damages.

BY THE COURT:

_____

Herbert A. Schaffner, Judge

Distribution:

Joseph A. Klein, Esq., Attorney for Plaintiff

Patricia A. Carey, Esq.,
Attorney for Defendant Stephen R. Reed

Supreme Court, U.S.
FILED
SEP 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-287

In The
# Supreme Court of the United States
October Term, 1987

—o—

STEPHEN R. REED,

*Petitioner,*

v.

JACK R. KARPER,

*Respondent.*

—o—

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

—o—

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## COUNTER-STATEMENT OF THE CASE

The case *sub judice* arises out of highly publicized public comments and written statements made by Petitioner Reed relating to alleged criminal conduct of Respondent Karper during the time period between November 5 and November 10, 1981, including a Petition filed by Reed in the Court of Common Pleas of Dauphin County seeking to enjoin alleged criminal conduct on the part of Karper, copies of which Petition were then publicly distributed and commented on by Reed (R. 127a, 711a-724a).

The initial press conference was convened by Reed on November 5, 1981, at a time when he was the unofficial and uncertified winner of a municipal election for the office of Mayor of the City of Harrisburg (R. 87a, 106a-109a). At that time, Reed called for an investigation of the City's Public Works Department where Karper served as Deputy Director and was charged with the management of the municipal steam-generating plant, more commonly known as the "incinerator" (R. 107a, 301a, 711a-716a). At that press conference, Reed released a letter sent by him to the District Attorney of Dauphin County and a captain of the Pennsylvania State Police, in which he alleged that certain officials within the Public Works Department may have taken kickbacks in exchange for contracts with that Department and might have benefited from bidding and non-bidding arrangements in the capacity as a "silent partner" of a local construction company (R. 107a-108a). In addition, Reed contended that City-owned equipment and personnel within the Public Works Department had been utilized for private and non-municipal purposes and that "ghost" employees were hired and payrolls padded

and that bids for municipal contracts were rigged on direct orders from administrative personnel within the Department of Public Works (R. 108a-109a, 711a-716a).

Reed further alleged that suspicious fires had occurred at several municipal facilities accompanied by the filing of false reports with the municipal police department and fraudulent claims which were allegedly sent to insurance companies which provided coverage for these facilities (R. 110a, 711a-716a).

Finally, Reed charged that an attempt was made to bribe the city policeman who was investigating the alleged arson and that it was possible that an arson ring may exist within the Public Works Department (R. 110a, 711a-716a). The above statements appeared in the November 4, 1981 edition of the Harrisburg *The Patriot* newspaper as well as on local television stations in Harrisburg and Lancaster (R. 711a-716a).

The press conferences were convened by Reed and the letters sent by him to the District Attorney and State Police captain were passed out to the media at Reed's direction (R. 113a-116a).

On November 6, 1981, Reed filed a Petition for a Preliminary Injunction with the Court of Common Pleas of Dauphin County alleging *inter alia* that Karper was removing municipal records from the incinerator facility on November 5, 1981, in conjunction with his daughter and an unidentified third person for the purpose of concealing and destroying the same and withholding them from the possession of the City of Harrisburg and that these records were essential to the investigation of cor-

ruption within the Department of Public Works (R. 254a, 725a-735a).

Based on the allegations contained in the aforesaid petition, a preliminary injunction was granted against Karper and others through an *ex parte* order by the Honorable John C. Dowling (R. 254a, 725a-727a).

Immediately following the issuance of the *ex parte* preliminary injunction, Reed again held a press conference in which he stated the purpose of seeking the injunction was to "freeze and protect these records which were extremely important to City government and that these records, which involve payroll, contracts and bidding information, should remain intact for any investigation conducted into the previously-cited criminal activities", and that "Karper is the motivating factor in why we done what we have" (R. 120a, 121a, 123a-126a, 717a-718a).

At the same time, however, Reed went on to say that he didn't know the exact nature of the files which were allegedly being removed by the Plaintiff and his daughter, but that Karper was still acting as superintendent of the incinerator plant and that it "seems suspect" that he would have so hastily removed his personal belongings (R. 124a, 717a-718a).

Reed concluded that the major reason he made the announcement was to make it more difficult for anyone to destroy records and to indicate that "we're interested in receiving information about such misconduct" (R. 124a, 125a, 717a-718a).

Reed's comments, as aforesaid, were published in the Saturday, November 7th edition of the Harrisburg *The Patriot* newspaper (R. 119a-120a, 717a-718a).

At the hearing held before the Honorable John C. Dowling for issuance of a preliminary injunction on Monday, November 9, 1981, Ricky Snyder, on whose affidavit Reed had based his petition, testified that he had seen two women moving boxes from Volkswagen automobiles into Karper's vehicle, but that he had not seen Karper at the scene, nor had he viewed him moving any boxes (R. 403a-404a).

Snyder went on to testify that "I told Mr. Reed that three cars were involved and the unidentified woman, and that's in fact what I said to him", and denied telling Reed that Karper was moving files (R. 404a). "If I had seen Jack Karper I would have said Jack Karper". (R. 405a).

Reed admitted at the preliminary injunction hearing that he had only one conversation with Snyder in the two years preceding that hearing (R. 417a).

Reed admitted that he had no personal knowledge as to what, if any, records were allegedly removed by Karper and that he had drafted the affidavit which was subsequently executed the following day by Snyder (R. 417a-418a).

The following testimony was given by Reed at the preliminary injunction hearing relating to his recollection of what he categorized as a "20-minutes conversation" which led him to draft the Snyder affidavit, and was read into the record in the trial of the case *sub judice*:

> "All three people whose cars were involved were also involved in the removal of files. It is entirely possible that was my misimpression and that's the way it was written . . . My primary questioning with Mr. Snyder over the telephone was over the content of the boxes since that is the essence of this entire proceeding, in my judgment anyway." (R. 418a-419a).

In response to the following question by Karper's counsel, "You went ahead and signed an affidavit to the petition setting forth that Respondent Karper, meaning Jack Karper, removed City records from the Vehicle Maintenance Center, did you not?", Reed replied, "We can certainly amend that, as apparently counsel had suggested prior to this hearing. I wasn't present for that prehearing conference." (R. 419a).

It should be noted that the affidavit drafted by Reed for execution by Snyder did not refer to any of the items allegedly being removed by Karper or the two women as either belonging to the City of Harrisburg or containing any identification relating to the same (R. 734a-735a).

Joseph K. Pierce, Esquire, who represented Reed in the equity action against Karper, testified on the morning of and preceding the preliminary injunction hearing on November 9, 1981, he had advised Reed that Snyder had notified him [Pierce] that there was a discrepancy in his affidavit with regard to the presence of Karper when material was allegedly being carried out of the building (R. 625a-626a).

Pierce testified that prior to drafting the preliminary injunction complaint, Reed had advised him that he had information from reliable sources *other* than Snyder about records being removed and on that basis he had formed the belief that in fact City records were being removed to keep them from the possession of the municipality (R. 629a-631a).

Although Reed testified at the trial in the lower court that he had received telephone calls from two individuals

prior to his conversation with Snyder indicating that records were being removed from the vehicle maintenance center, he did not know who they were and, in fact, could no longer recall their names (R. 439a-631a).

Reed subsequently referred to these two alleged telephone informants as being "eye-witnesses" whose "statements" were the basis for executing the affidavit required to file the petition for the preliminary injunction and allegation that "records" were being removed, but later modified his testimony to the effect that these witnesses never stated that records were being removed, but rather "suggested" the same (R. 459a-463a).

Reed later characterized the alleged phone calls from the two unidentified persons "as being worthless as far as testimony is concerned" and testified that he relied only on Snyder's statement (R. 523a-524a).

Insofar as Reed's allegations at press conferences relating to alleged criminal activity of the Department of Public Works, including arson, theft, use of public equipment for private use, payroll padding, etc., he stated that any information he had received with reference to these allegations was of no better quality than that which he received from Snyder (R. 511a-512a).

Despite his characterization of his conversation with Snyder and the two unidentified callers, Reed signed an affidavit in support of this petition for the preliminary injunction which set forth that he had "reliable information that City *employees* (emphasis added) saw records, documents, papers, contracts, bids, filings, etc. being removed from the custody, control and ownership of the

City for the sole purpose of having these records permanently destroyed, hidden or otherwise removed from the City's custody, control and ownership" (R. 727a-735a).

The affidavit that Reed formulated for execution by Snyder did not contain any reference to "City files" (R. 476a, 477a, 734a-735a).

Reed testified that he relied on the advice of counsel (Joseph K. Pierce, Esquire and William R. Balaban, Esquire) in filing the petition for preliminary injunction, but that Mr. Balaban stated he never thought Reed had much of a chance at prevailing in that action (R. 516a-517a).

Prior to the preliminary injunction hearing, Reed informed news reporters from the Harrisburg *Evening News* that he was seeking the injunction to put the "fear of God" into those individuals who might remove official records—"it happened so often and can happen so easily". (R. 162a, 723a).

Subsequent to Judge Dowling's dismissal of said petition, Reed informed the media that he did what he "believed necessary" after receiving reports that records were being removed and that while the injunction was not granted "we have sent a clear message" that actions in Harrisburg City Hall during the next two months, until he was to take office, would be carefully reviewed (R. 134a, 721a-722a).

Reed further admitted that he had, on several occasions prior to November 5, 1981, made allegations of criminal misconduct relating to Karper to the Pennsylvania State Police (R. 466a).

Reed acknowledged that his allegations that Karper removed municipal records could be a violation of the Pennsylvania Crimes Code and that certainly the destruction or removal or tampering or misuse of public records, as set forth in his petition for a preliminary injunction, was a violation of the Pennsylvania Criminal Codes. (R. 464a-465a).

Despite Petitioner's reference in its Statement of the Case to federal grand jury investigations and allegations of illegal bid procedures by Respondent, no testimony was produced at the trial of this cause linking Respondent to any improper, let alone, illegal activities and the City Controller, a member of Petitioner's political party testified that he approved all invoices in question.

———o———

## REASONS FOR DENYING THE WRIT

### I. The State Court Decision Below is in Conformity with Applicable Decisions of this Court.

A petitioner, not content with a thrice told tale, now seeks yet another review by this Court of a determination made by three state courts that the question of petitioner's actual malice was appropriately submitted to a jury for its determination.

This Court in what must have been a prescient vision of petitioner's position in the case *sub judice*, held in *St. Amant v. Thompson*, 390 U.S. 727,

> the defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was

> indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is a product of his imagination, or is based wholly on an unverified anonymous telephone call.

*Id.* at 732.

Petitioner now challenges the findings of these three courts that there was constitutionally sufficient evidence establishing actual malice with regard to his published statements to submit the same to a jury and contends that based exclusively upon his self-contradictory testimony (which was rebutted not only by his purported affiant, Snyder, but by his own attorney, Pierce), a verdict should have been directed in his favor.

The trial court appropriately held:

> There was ample evidence about the defendant's conduct and about the pertinent circumstances prior to and at the time that the alleged defamatory statements were made from which the jury could well determine Mr. Reed's intentions and could assess the knowledge that he had. There being evidence from which the jury could determine that Mr. Reed acted with malice, and considering that the court charged the jury on this issue satisfactory to Mr. Reed, the issue was properly for the jury.

Petition for a Writ of Certiorari, p. 17a.

The Superior Court of the Commonwealth of Pennsylvania noted:

> The record contains a statement by Snyder that he did not see Karper moving records and that if he had seen Jack Karper, 'he would have said Jack Karper'. Reed, in turn, admitted that Snyder was the only one upon whom he relied stating that until his conversation with

> Snyder 'there was nothing really to go on'. Further, despite the lack of specific information from Snyder, Reed stated in his sworn court petition that the removed material included contracts, bids and filings.
>
> Our careful review of the record leads us to conclude that Reed acted with at least reckless disregard of falsity and with actual malice as to the allegations against Karper. We conclude that the evidence met constitutional standards and is clear and convincing.

Petition for Writ of Certiorari, pp. 9a, 10a.

Neither the trial court nor the Superior Court delegated its constitutional responsibility for independent review of the evidence to the triers of fact, but specifically found the evidence to be legally sufficient to withstand a motion for a directed verdict.

Petitioner confuses the trial court's obligation to determine whether there is clear and convincing evidence of "actual malice" as the same has been defined by this Court prior to submitting the case to a jury with some illusory duty to first specify the same in written form before allowing the jury to deliberate this issue. There simply is no authority for this novel proposition nor does Petitioner endeavor to conjure the same.

The Supreme Court of Pennsylvania in *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971) held that the trial court must "review the evidence adduced to determine its sufficiency to warrant submission of the case to the jury without impairing the Defendant's constitutional rights." *Id.* at 911-12.

What Petitioner seeks in actuality is to have this Court eviscerate the role of a jury by reassessing the credibility

of witnesses who testified at trial, and in so doing, misreads this Court's holding in *Bose Corp. v. Consumers Union of United States,* 104 S.Ct. 1949 (1984).

This Court stated: "We have repeatedly held that the Rule means what it says . . . It surely does not stretch the language of the Rule to characterize an inquiry into what a person knew at a given point in time as a question 'fact'." *Id.* at p. 1958.

In footnote 15, which immediately follows the above quote, the Court in *Bose, supra,* at p. 1958, states: "Indeed, in *Herbert v. Lando,* 441 U.S. 1953 . . . we referred in passing to actual malice as 'ultimate fact'."

In *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971), this Court held that interpreting the standard of malice in a case involving a public figure *and* a media defendant:

> That standard requires only that the plaintiff prove knowing or reckless falsity. That burden, and no more, is the plaintiff's whether 'public official', 'public figure' or 'little man'. It may be that jury instructions that are couched only in terms of knowing or reckless falsity, and omit reference to 'actual malice' would further a proper application in the *New York Times* standard to the evidence.

*Id.* at 52.

Although Reed is clearly a non-media defendant he has nevertheless been afforded on three occasions an independent examination of the evidence on the question of actual malice and there is more than clear and convincing evidence of the same. *Time, Inc. v. Pape,* 401 U.S. 279 (1971).

It is Petitioner's own testimony which establishes the clear and convincing evidence of "actual malice" and

deprives him under even the most stringent review of the right to be awarded a directed verdict.

Reed, despite admitting to Snyder's inability to describe what documents he saw in Karper's car on that fateful day (let alone Karper's presence at that time), nonetheless executed an affidavit stating that the same contained "contracts, bids, or filings" which he alleged were being removed by respondent with the intent to destroy them and keep them from the City's custody.

This conscious distortion of a conversation with a casual acquaintance does not constitute "one of the number of possible rational interpretations" of an event "that bristled with ambiguities and descriptive challenges for the writer" as in *Bose, supra,* at p. 1966 nor are Petitioner's totally groundless allegations of criminal conduct by Respondent worthy of being given constitutional "breathing space". *Id.* at 1966.

———o———

## CONCLUSION

For all of the foregoing reasons, the judgment of the Supreme Court of Pennsylvania should not be reviewed by this Court and Petitioner's Writ for Certiorari should be denied.

Respectfully submitted,

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